on admissions agreed to by the parties and that a court can only act on such evidence and admissions. Nevertheless it must be a matter of some certainty that there must come a time when Salbiah's parents will not be able to look after her physical needs and will have to call on outside assistance which will have to be paid for. Even if it is otherwise and Salbiah's parents can look after her, they will have to be compensated for the time and money spent on such care and such compensation, in our view, must be a charge for future care.

If we are not to shirk our duty to apply the principle of law that the compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong, a principle distilled by Lord Scarman from *Livingstone* v. *Rawyards Coal Co.*,[9] we must do the best we can as we are enjoined by authority to do, in the circumstances of this case and the evidence or rather in the absence of it. But we must also bear in mind the facts of the accelerated payment and the availability of capital as well as income to meet the cost of care and the contingency that Salbiah may not live out her full expectation of life. She is now aged 12. In all the circumstances of the case we therefore take a multiplier of 25 years' purchase on a multiplicand of $150 and reach a figure of $25,362 for cost of future care.

(5) *Loss of future earnings:*

Despite the tender age of Salbiah, we have not the slightest doubt that if she had not been injured and rendered totally incapable of gainful employment, she would have, at the appropriate age, earned an income for herself. This she has now lost by reason of the tort committed on her by the respondent and for this in our view she must receive compensation.

The basis for such an award is that she should recover for her future loss "a capital sum which, after all proper deductions, will represent her loss of earnings, net after allowing for working expenses, and her cost of care, net after deducting the domestic element. A capital sum so assessed will compensate for a genuine loss and for a genuine item of additional expenditure, both of which arise from the injury she has sustained. It will not contain any element of duplication or go beyond compensation into surplus."

Unfortunately we do not have any evidence of Salbiah's social and economic background or her prospects. We have again to do the best we can and doing just that, we take what we believe to be a reasonably moderate figure of $200 for her net monthly income and having regard to a span of a working life of, say, 25 years, having regard to her age and to the discounts earlier referred to as necessarily to be taken, we arrive at a figure of $33,816.

On the authority of *Cookson* v. *Knowles, supra,* and of the latter case of *Thompson* v. *Faraonio,*[10] on appeal from the Full Court of the Supreme Court of South Australia, in which the Privy Council held that on principle there should be no interest on an award for future loss of earning capacity, this sum shall not bear interest, nor will the sum awarded for cost of future care.

The total of general damages:

In the result, the total now comes to $129,178. Lord Scarman has made it clear that the amount of the total is quite immaterial and that if the tortfeasors are to succeed, they must show that one or more of the component items of the award are wrong. But for the purpose of this appeal, having regard to the global award made and the absence of any indication of the amount of each proper head of claim, the total serves as an indication whether the award made was so excessive or so inadequate that an appellate court ought to intervene. Clearly the global sum awarded is so inadequate that we must have no hesitation to substitute our assessment for that of the trial judge.

It is obvious and we state this as a fact that the High Court had been labouring under a misdirection and the Federal Court met with considerable difficulties because no sufficient consideration had been given to the proper claims for damages in a case such as this and the proper assistance which a trial court must have a right to expect, was not given. But this we must also say. When the only issue is the question of general damages, there can be absolutely no justification for the inclusion in the Record of Appeal of those pages — pages 35-36, and 42 relating to special expenses and pages 39-41 relating to negligence: see *Ooi Soon Eng* v. *Ng Kee Lin;*[11] *Chow Yee Wah & Anor.* v. *Choo Ah Pat*[12] and the judgment in *Syarikat Jengka Sdn. Bhd.* v. *Abdul Rashid bin Harun.*[13]

The appeal is allowed, the award of $129,178 will be substituted for the $75,000 award of the High Court. The appellant shall have the costs of the appeal except for the costs of the unnecessary pages in the record referred to in the preceding paragraph. The award is to be paid to the Public Trustee to be held in trust for Salbiah.

Appeal allowed.

Solicitors: *R.K. Nathan & Co.; Sri Ram & Co.*

SAM WUN HOONG v. KADER IBRAMSHAH

[F.C. (Suffian L.P., Abdul Hamid F.J. & Mohamed Azmi J.) December 11, 1980 & January 20, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 16 of 1980]

Tort — Negligence — Road Accident — Damages — Future Loss of earnings and loss of earning capacity — Compensation under Workmen's Compensation Ordinance — Whether relevant.

Damages — Leg amputation — Loss of earning and earning capacity — Future loss.

In this case the appellant a contractor was injured in a road accident, as a result of which his right leg below the knee was amputated. The learned trial judge held that the appellant was partly to blame for the accident to the extent of 25%. On 100% liability he awarded as special damages $2,995 for out of pocket expenses and $25,000 for actual loss of earnings; and for general damages he awarded $35,000 for pain and suffering and loss of amenities and $12,000 for loss of earning capacity. These amounts were reduced by 25%. No award was made for future loss of earnings on the ground that there was insufficient evidence to make such an award. The appellant appealed against the refusal of the learned judge to make an award for loss of future earnings and also argued that the award of $12,000 for loss of earning capacity was too low compared to the provisions of the Workmen's Compensation Ordinance for similar injury.

Held: (1) the learned trial judge was correct in not making an award for loss of future earnings as there was no evidence of such possible loss of earnings by the appellant as a result of the loss of his right leg;

(2) the award of $12,000 for loss of earning capacity was fair and reasonable having regard to the nature of the appellant's work and the failure of the appellant to prove future loss of earnings.

Cases referred to:-

(1) *Ti Huck & Anor.* v. *Mohamed Yusof* [1973] 2 M.L.J. 62, 66.

The following cases were also cited in argument: *Arthimoolam Govindasamy* v. *Chong Lai Thin* [1964] M.L.J. lxxiv; *Yeo Suat Sin & Anor.* v. *The Singapore Traction Co. Ltd.* [1965] 1 M.L.J. xviii; *Elangovan* v. *Lee Yew Kow & Anor.* [1977] 1 M.L.J. lxxx; *Teoh Ah Bah* v. *Ariffin bin Dahaman & Anor.* [1977] 2 M.L.J. xlviii; *Liew Kwee Chin* v. *Hong Huat Timber Trading Co.* [1979] 2 M.L.J. cxxxix; *Lai Su Yan* v. *Syarikat Kemajuan Tanah Sino-Malay* [1980] 1 M.L.J. xlvi; *Murugan s/o Poomie* v. *Lew Chu Cheong* Quantum in Accident Claims, Vol. II, K.S. Dass @ 266; *Ibrahim bin Samsudin* v. *Kong Pak Kooi* Quantum in Accident Claims, Vol. II, K.S. Dass @ 266; *Yew Kwai Lan (m.w.)* v. *Lim Eng Hin @ Lim Sye Tiok* Quantum in Accident Claims, Vol. II, K.S. Dass @ 267; *Rasidin bin Partorjo* v. *Frederick Kiai* [1976] 2 M.L.J. 214; *Mahmod bin Kailan* v. *Goh Seng Choon & Anor.* [1976] 2 M.L.J. 239.

HIGH COURT.

S.C. Chan for the plaintiff.

Dato' Wong Seng Chow for the defendant.

Cur. Adv. Vult.

Ajaib Singh J.: The plaintiff in this case has appealed against the quantum of damages relating to loss of earning capacity for which I awarded a sum of $12,000.

Mr. S.C. Chan for the plaintiff submitted that for the loss of future earnings the plaintiff should be awarded a sum of $92,300. He said that the plaintiff earned about $1,250 per month before the accident and thereafter his earnings were reduced to half that amount. He referred to the 1st Schedule to the Workmen's Compensation Ordinance 1952 where the minimum percentage of loss of earning capacity for loss of leg below the knee is stated at 50%. Mr. Chan submitted that this should be adopted in arriving at the sum for the plaintiff's loss of future earnings. He submitted that the plaintiff was aged 32 years, he could work up to 60 years and he had a working life of 28 years. By scaling it down to 21 years the amount on the actuarial table would come to $92,300 as loss of future earnings — at $600 per month.

In my view however there was insufficient evidence to make any award for the loss of future earnings. It is true that the plaintiff was handicapped because his leg had been amputated below the knee but on the evidence of DW3 the chief clerk of the estate which had given out contracts to the plaintiff there does not appear to be much loss of earnings for the plaintiff when he resumed the contracts himself in 1979. The position in relation to the value of contract work which was given to the plaintiff from 1977 to 1979 was as follows: —

1. January 1977 to April 1977 ... $26,120.76
(Met with accident on 30.4.77)
2. May 1977 to December 1977 ... $60,766.15
(This contract was taken over by the plaintiff's brother Sam Woh Choo)
3. January 1978 to December 1978 ... $89,295.87
(Also taken over by Sam Woh Choo)
4. January 1979 to March 1979 — about $ 6,000.00
(Contract taken out by plaintiff himself)
5. April to December 1979 ... $56,930.18
(To plaintiff himself)

According to the evidence of the defendant's first three witnesses which I accepted the plaintiff had been seen driving around in the estate in his car as well as in his pick-up van after the accident when he resumed his contracts in 1979. He has also walked along the terraced estate supervising the work. And basing on his satisfactory work in 1979 when he himself resumed the contract work there was no reason why the plaintiff would not get the contract work in future.

The Workmen's Compensation Ordinance is not applicable in this case although it may serve as a guide in suitable cases where the injured person is in employment of a kind not very different from those who are protected by the Ordinance. In the present case however I do not think that the plaintiff who is an estate contractor can avail himself of any assistance from the Workmen's Compensation Ordinance.

In the circumstances therefore I was of the view that there was not sufficient evidence on which I could base an award for future loss of earnings. After he had himself taken over the contracts from 1979 the plaintiff had been earning from his contract work just as he was before he met with the accident. Unlike in some cases where there is clear evidence of specific loss of future earnings which can be reasonably calculated this case appears to be on a somewhat different footing. As an estate contractor the plaintiff still was in a position to earn just about the same amount as before the accident but in view of his disability there was a case for awarding some loss of earning capacity. For this heading I was of the view that a sum of $12,000 was fair and reasonable.

From the above judgment the defendant appealed to the Federal Court.

FEDERAL COURT.

S.C. Chan for the appellant.

Dato' Wong Seng Chow for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J. (delivering the judgment of the Court): We dismissed this appeal and now give our reasons.

This was an appeal against quantum of general damages in respect of future loss of earning and loss of earning capacity.

The appellant in this case was aged 32 years. He was and still is one of the contractors in Sua Betong Estate and other Estates. As a result of the motor accident on April 30, 1977, for which he was found 25% to blame, his right leg below the knee was amputated. On 100% liability, the learned judge

would have awarded under special damages a total sum of $2,995 for out-of-pocket expenses and loss of cash; and $25,000 for actual loss of earnings for 20 months at $1,250 per month. Under general damages, he would have awarded $35,000 for pain and suffering and loss of amenities, and $12,000 for loss of earning capacity. As he found the plaintiff partly to blame, he reduced all these amounts by 25%. No award was made for future loss of earning on the ground that there was insufficient evidence to make such an award.

The appellant was dissatisfied with the refusal of the learned judge to make an award for loss of future earning. As to the award of $12,000 for loss of earning capacity, the appellant argued that it was inordinately low when compared to the provisions of the Workmen's Compensation Ordinance for similar injury.

In an action for personal injuries, there are two classes for damages which have to be considered — special damage which has to be specially pleaded and general damage which need not be specially pleaded. In both classes of damages, the burden of proof based on the balance of probabilities in the evidence, lies on the plaintiff. Special damage consists of out-of-pocket expenses, such as hospital bills and actual loss of earning during period of total incapacity, and is generally capable of substantially exact calculation. General damage comprises damage for pain and suffering, loss of amenities and the like which the law implies, and in certain cases where the injuries suffered are such as to lead to continuing or permanent disability, it includes future loss of earnings and loss of earning capacity. Under the heading of pain and suffering and loss of amenities, the quantum is mainly assessed on the nature of injuries sustained and the period of hospitalization, and in arriving at a figure, the court is guided by previous awards in cases involving similar type of injuries with allowances being given as to the plaintiff's age, marital status, his special position socially or in business, depreciation or appreciation of money value and other relevant circumstances. As regards loss of future earning and future loss of earning capacity, although such loss can be implied in appropriate cases, the award should be a nominal one, unless the plaintiff can prove such future loss is in fact sufficiently severe to warrant a substantial award. Further, such implied loss can be rebutted by the evidence, and if the evidence does in fact disclose or sufficiently disclose no future loss of earning or loss of earning capacity, no award need be given under these headings.

As to future loss of earning, the appellant is still doing and can continue to do the work of an estate contractor in Sua Betong Estate and other estates, the same business he was engaged in before the road accident. His earning was and is still dependent on the availability of contracts given by the estates. The question was: is there any evidence of any possible loss of earning he may incur in the future as a result of the loss of his right leg? From the evidence of Mr. William Macman N. Urquhart, the Manager of Sua Betong Estate (DW1), basing on his work performance in 1979, there was no reason why he should not get contract work for 1980. At the time of accident, he did not do the work himself, but employed about thirty workers at three work sites to do the weeding, replanting and harvesting of oil palms. After the accident in 1979, he was seen driving and supervising the work in the estate. From May 1977 to December 1978, as a result of the accident, the plaintiff's contract work was taken over by his brother Sam Woh Choo, a lorry driver. From January 1979 to December 1979, the contract was taken back by plaintiff. Since the plaintiff's earning before the accident was dependent on availability of contract works in the various estates and since his work involved merely the supervision of workers and not in the work itself, it cannot be said with certainty and it is difficult to forecast with any accuracy whether he will continue to get the contracts from the various estates. The chances of him getting a contract appear to be the same both before and after the accident. The getting of contract does not depend on his physical condition. It depends on his ability to supervise the workers as shown by the evidence of DW1, DW2 and DW3 that in 1979 the appellant was capable of supervising the work and giving instructions to his mandurs in the field. The learned judge's reasoning in not making any award for loss of future earnings was supported by the evidence. There is a difference between an award for loss of earning and compensation for loss of earning capacity. Damages for loss of future earnings are for real assessable loss, sufficiently provable by evidence. For loss of earning capacity, compensation is given by way of general damages. (See *Ti Huck & Anor.* v. *Mohamed Yusof*[1]). It is true that the volume of contracts undertaken by the appellant in 1979 was $23,956.73 lower than that of 1977, and $26,365.69 lower than that of 1978, i.e. an average drop of about $25,000; but what is the explanation for the increase by $2,408.96 in 1978 as compared to 1977? The figures for the three years do not appear to be a reliable basis for the proposition that there is a loss of future earnings. The increase in earning in 1978 as compared to 1977 supports the conclusion that the plaintiff's earnings depend more on the availability of contract work in the estates, rather than on physical abilities or disabilities.

As regards the argument that the award of $12,000 for loss of earning capacity being inordinately low as compared to the provisions of the Workmen's Compensation Ordinance 1952, learned counsel for the appellant now concedes the 50% loss of earning capacity is too high. In any event, we do not think that that Ordinance, enacted for the payment of compensation to workmen for injury suffered in the course of their employment, can be applied to running down cases. In our view, the award of $12,000 is fair and reasonable, having regard to the nature of the appellant's work and the failure of the appellant to prove future loss of earnings.

We would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Murphy & Dunbar; Shearn Delamore & Co.*